IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JAIPUR BENCH

JUDGMENT

1. Surendra Singh & Another Vs. State of Rajasthan
(D.B. Criminal Appeal No.1636/2003)

2. Hoshiyar Singh Vs. State of Rajasthan
(D.B. Criminal Appeal No.1585/2003)

D. B. Criminal Appeals under Sec.374 (2) Cr.P.C. against the judgment dated 17-10-2003 in Sessions Case No.37/2002 passed by Sh. Prakash Chandra Sharma, RHJS, Additional Sessions Judge (Fast Track) No.2, Bharatpur.

Date of Judgment: August 08, 2007.

PRESENT

HON'BLE MR. JUSTICE SHIV KUMAR SHARMA
HON'BLE MR. JUSTICE GUMAN SINGH

Mr. Arvind Kumar Gupta] for the appellants.
Mr. Shiv Charan Gupta]
Mr. Vaibhav Gehlot]

Mr. M.L.Goyal, Public Prosecutor for the State.
Mr. Rajesh Moondia, for the complainant.

BY THE COURT: (PER HON'BLE Shiv Kumar Sharma,J.)

On the fateful night of May 12, 2002 Chandan Singh was shot dead while he was proceeding on a new Hero Honda Motor Cycle from village Nadbai to Useer. The appellants, three in number, were indicted for the alleged crime before learned Additional Sessions Judge (Fast Track) No.2, Bharatpur, who vide judgment dated October 17, 2003 convicted and sentenced the appellants as under:-

Surendra Singh:
U/s.302 IPC:

To suffer life imprisonment and fine of Rs.1000/-, in default to further suffer rigorous imprisonment for one year.

U/s.392 IPC:

To suffer rigorous imprisonment for four years and fine of Rs.1000/-, in default to further suffer rigorous imprisonment for one year.

U/s.3/25 Arms Act:

To suffer rigorous imprisonment for one year and fine of Rs.1000/-, in default to further suffer rigorous imprisonment for one year.

Khargo @ Khargendra Singh and Hoshiyar Singh:

U/s.302/34 IPC:

Both to suffer life imprisonment and fine of Rs.1000/-, in default to further suffer rigorous imprisonment for one year.

U/s.392 IPC:

Both to suffer rigorous imprisonment for four years and fine of Rs.1000/-, in default to further suffer rigorous imprisonment for one year.

Substantive sentences were ordered to run concurrently.

2. The prosecution case runs as under:-

On May 13, 2002 at 8 AM Sumran Singh (Pw.6) submitted a written report (Ex.P-10) at Police Station Nadbai with the averments that in the preceding night around 9-10 PM his nephew Chandan Singh, along with Bacchu Singh, left village Nadbai for Useer on Hero Honda Motor Cycle. Bachhu Singh however got down at village Luhasa and Chandan Singh proceeded further. No sooner did Chandan Singh cross village Luhasa, certain miscreants opened fire at him and killed him. Leaving dead body in a pool of blood, the miscreants took away motor cycle with them. On that report case under sections 302 and 394 IPC was registered and investigation commenced. Autopsy on the dead body was performed, necessary memos were drawn, statements of witnesses were recorded, appellants were arrested and on completion of investigation charge sheet was filed. In due course the

case came up for trial before the learned Additional Sessions Judge (Fast Track) No.2, Bharatpur. Charges under sections 302, 302/34, 397/34 IPC and 3/25 Arms Act were framed against the appellants, who denied the charges and claimed trial. The prosecution in support of its case examined as may as 34 witnesses. In the explanation under Sec.313 CrPC, the appellants claimed innocence. Two witnesses in support of defence were examined. Learned trial Judge on hearing final submissions convicted and sentenced the appellants as indicated above. A look at the impugned judgment demonstrates that learned trial court while convicting the appellants has placed implicit reliance on the testimony of Jagdish Prasad (Pw.28) who saw the appellants standing together with scooter No.UP 85 B0569 on the way between village Luhasa and Manjhi. Circumstances of recovery of 12 Bore Katta (country made pistol), key of motor cycle and scooter at the instance of appellant Surendra Singh were taken into consideration whereas appellants Khargo and Hoshiyar Singh were convicted because recovery of golden chain and ring allegedly belonging to deceased got effected on the basis of their disclosure statements.

3. Admittedly there is no ocular version of the incident and the prosecution entirely bases its case on circumstantial evidence. Learned counsel for the appellants canvassed before us that the circumstances relied on by the prosecution have not been satisfactorily established and that in any event the circumstances said to establish against the appellant do not provide a complete chain to bring home the guilt against the appellants.

4. The standard of proof required to convict a person on circumstantial evidence is now well established by a series of decision of the Hon'ble Supreme Court. According to that standard the circumstances must

be fully established and the chain of evidence must be so complete as not to leave any reasonable ground for a conclusion consistence with the innocence of the accused. Bearing these principles in mind we shall examine the circumstances appearing against the appellants.

5. Death of Chandan Singh was undeniably homicidal in nature. As per post mortem report (Ex.P-29) following ante mortem injuries were found on the dead body:-

> 1. Gun shot wound 2 x 2 cm round on back Rt. side 10cm from back bone at 10 to 11th intercostal space. Margin of wound irregular and ragged. Blackening around the wound bleeding present. Direction downward inward and medially. Only wound of entrance no exit wound.
> 2. Abrasion 1½ x ¾ cm on Rt. elbow posteriorly.
> 3. Abrasion 1¼ x 1½ cm on Rt. arm laterally in lower 1/3.

In the opinion of Autopsy Surgeon (Pw.32) the cause of death was shock from hemorrhage due to gunshot leading to injury and excessive hemorrhage from vital organs.

6. We now proceed to consider the circumstances relied on by the prosecution.

TESTIMONY OF JAGDISH PRASAD (PW.28):

7. In his deposition Jagdish Prasad stated that on May 12, 2002 around 9 PM while he was going on his truck NoRJ05/G-0742 from Nadbai to Nagar he saw Hoshiyar Singh, Surendra Singh and Khargo Singh standing with scooter No.UP85/B0569 on the road between village Luhasa and Manjhi. He knew Surendra Singh because he was involved in photography business at Bharatpur. Hoshiyar Singh and Khargo were frequently seen in

his company. When Jagdish Prasad was confronted from his police statement (Ex.D-7) he explained that he did give scooter number to police, but police did not incorporate it in the statement. The fact that he did not go directly to village Nagar but did go via village Manjhi, was also missing in the police statement. It is further revealed from the evidence of Jagdish Prasad that despite having knowledge of murder of Chandan Singh in the nearby area where he saw the appellants standing, he did not go forthwith to the police station. It was after so many days that the investigating officer himself called him to record his statement and identify the appellants. According to him two different roads connect village Luhasa and Nagar:-

"यह सही है कि नदबई से नगर का रास्ता अलग है और लुहासा का रास्ता अलग है।"

Although there was direct way from Nadbai to Nagar, Jagdish Prasad did prefer longer route via village Luhasa because he wanted to take food at village Manjhi.

8. A witness may be discredited by proof of his former statements inconsistent with his present testimony. Material inconsistencies noticed by us in the testimony of Jagdish Prasad affect his credibility. It is difficult to believe that a Truck driver while casually passing through the road would remember scooter number of the persons met him on the way. It is also difficult to agree that a truck driver while leaving village at 9.30 PM would not take food and proceed in the state of hunger. Even person of ordinary prudence would not believe that when there was a direct route from Nadbai to Nagar, a truck driver would prefer indirect and longer route via village Luhasa. Dubious conduct of Jagdish Prasad and long delay in recording his police statement create doubt about his truthfulness. On examining the testimony of Jagdish Prasad from the point of view of trustworthiness we

find him highly unreliable witness.

RECOVERY OF GUN AND KEY:

9. Appellant Surendra Singh was connected with the crime on the basis of his disclosure statement in regard to country made pistol, allegedly used in commission of offence, and the key of motor cycle. Surendra Singh was arrested on June 11, 2002, i.e. after one month of the incident, vide arrest memo (Ex.P-70). Recovery of Katta is alleged to have been affected from his residential house and recovery memo (Ex.P-24) was drawn. Ranveer Singh (Pw.20) and Preetam Singh (Pw.25), who were associated as Motbirs, were not inhabitants of the locality. It also appears that the investigating officer recovered a cartridge case from the place of occurrence and sent it to FSL for examination. Description of recovered articles sent for examination as per FSL report (Ex.P-30) is as under:-

> "Packet `C' contained:
>
> One damaged paper tube of 12-bore KF Special cartridge case, marked C/1.
>
> Packet `E' contained:
>
> (i) Two wads marked D/1 & D/2
>
> (ii) Fifty five lead pellets.
>
> Packet `H' contained:
>
> (i) One metallic head portion of 12 bore KF Cartridge case marked C/2.
>
> (ii) One 12-bore country made pistol marked W/1.
>
> Note Three sealed packets A,B &D are being forwarded to Serology Division for further examination.
>
> Result of Analysis:
>
> 1. One 12-bore country made pistol (W/1) from Packet `H' is a serviceable fire arm.
>
> 2. The examination of the barrel residue indicates that submitted 12-bore country made pistol (W/1) had been fired. However, the definite time of its last fire could not be ascertained.

> 3. One paper tube of 12-bore cartridge case (C/1) could be part of metallic head portion of 12-bore cartridge case (C/2).
> 4. Based on stereo & Comparison microscopic examination, it is the opinion that one metallic head of 12-bore cartridge case (C/2) from packet `H' has not been fired from submitted 12-bore country made pistol (W/1). However no opinion could be given on paper tube of 12-bore cartridge case (C/1) in order to link with submitted 12-bore country made pistol (W/1) due to lack of evidence.
> 5. Two wads (D/1 & D/2) and fifty five lead pellets from packet `E' are normally used in 12-bore ammunition and these could have been fired from submitted 12-bore country made pistol (W/1)."
>
> (Emphasis Supplied)

10. Evidently country made pistol, allegedly recovered at the instance of Surendra Singh, did not have any link with the head of 12-bore cartridge case found near the dead body. Thus the prosecution could not establish beyond reasonable doubt that the pistol, allegedly recovered from Surendra Singh, was used in commission of the offence.

11. In so far as recovery of key of motor cycle is concerned, we notice that much prior to the said recovery the motor cycle of the deceased was found lying on an open place near Laxman Mandir on May 14, 2002 i.e., after two days of the incident. It got seized under the Police Act as an unclaimed property. They key of motor cycle however is alleged to have been recovered on June 14, 2002 from the house of Surendra Singh. From its very inception the recovery of key appears to be farce. Why would a person keep the key after abandoning motor cycle at a lonely place.

RECOVERY OF GOLDEN CHAIN AND RING:

12. It is the prosecution case that at the time of death deceased was wearing golden chain and ring and the said ornaments were removed by the

miscreants. Golden chain and ring got recovered at the instance of appellants Khargo and Hoshiyar Singh and wife of the deceased identified those ornaments in presence of Magistrate. Before analysing the evidence adduced in this regard we deem it necessary to refer to Rule 7.32 of the Rajasthan Police Rules, 1965, which relates to the identification of property:-

> "7.32 Identification of property.-
> (i) It is of utmost importance that the articles of property seized by the investigating agency shall be properly scaled on the spot and it should be ensured that the seals are intact.
> (ii) The number of articles to be mixed up with the articles of property required to be put to identification test should rest with the Magistrate before whom the proceedings are to be carried on.
> (iii) The articles of property to be mixed up to with the articles of property put for the purpose of identification should also be contained in scaled bundles.
> (iv) The seals must be all along intact and can only be opened before the Magistrate conducting the identification proceedings.
> (v) As in the identification parade of suspects, witnesses are to be called one by one and no succeeding witness should communicate in any manner with the preceding one.
> (vi) It is also important to note that the articles to be mixed up should be similar in appearance to those for identification.
> (vii) The prosecuting inspector or the prosecuting sub-inspector may be present at the time of identification proceedings.
> (viii) The articles to be mixed up should be arranged for production according to the instructions of the Government which they may issue in this behalf. However, there should be given no chance, whatsoever for an objection that the articles brought for being mixed up were exposed to the identifying witness before identification proceedings took place. <u>The arranging of such articles to all intents and purposes should be by an agency other than the police</u>.
> (ix) Proceedings of the identification of property shall be recorded in Form 7.32(ix)."
>
> (Emphasis Supplied)

13. Coming to the evidence of Rajendra Singh IO (Pw.34) we find that on the basis of disclosure statement of Khargo (Ex.P-33) golden chain on which `CS' was written, got recovered vide recovery memo Ex.P-12 and at the time of recovery Ashok (Pw.7), cousin of deceased, identified the same as of deceased. Similarly Hoshiyar Singh's information given about golden ring under section 27 of Evidence Act was recorded in the memo Ex.P-34 and pursuant to the information one golden ring got recovered vide memo Ex.P-11.

14. A look at the testimony of Ashok (Pw.7) goes to show that although he had been in touch with the police from May 12 to May 25, 2002 he did not disclose to the police that at the time of incident deceased was wearing golden chain, ring and wrist watch. It was on May 26, 2002 that for the first time he informed about these articles to the police.

15. Prem (Pw.8), the wife of deceased, in her cross examination deposed that at the time of visiting the place of occurrence she did not notice whether the ornaments were on the dead body or not. She also admitted that her statement was recorded by the police after the arrest of accused.

16. Shri Kamal Ram Meena (Pw.33) learned Sub Divisional Magistrate, before whom the alleged ornaments were produced for identification, deposed that SHO took the ornaments in presence of Advocate and placed before him. The statement reads as under:-

> "माल को एस एच ओ व एक वकील की उपस्थिति में, जो सील बंद स्थिति में था, थानेदार ने पेश किया था, जिसे मैंने व थानाधिकारी नदबई ने खोला था। यह सही है कि थानाधिकारी नदबई व वकील श्री रतीराम कार्यवाही शिनाख्तगी के दौरान मेरे कार्यालय में ही रहे। चूंकि मृतक चन्दन, वकील श्री रतीराम के गांव का था, इसलिए रतीराम वकील साहब को कार्यवाही शिनाख्तगी की विश्वसनीयता के लिए बुलाया था। आर्टीकल- दो अंगूठी जिसे शिनाख्त किया था, इससे मिलती

जुलती 4 अंगूठियों को एस.एच.ओ. राजेन्द्र सिंह लेकर आया था। यह सही है कि मैंने स्वयं ने आर्टीकल- दो अंगूठी में मिलाये जाने वाली एक जैसे अंगूठियों लेकर आने हेतु स्वंय ने कोई प्रयास नहीं किये।"

17. Having carefully considered the ocular and documentary evidence we find that circumstances of recovery of ornaments could not be established against Khargo and Hoshiyar Singh. The reasons are:-

(i) There is no reference in the written report (Ex.P-19) that deceased was wearing golden chain and ring. It was only stated that miscreants took away motor cycle after killing his nephew:-

"बदमाशान उक्त मोटर साईकिल को मेरे भतीजे को खत्म कर ले गये हैं।"

(ii) The wife and cousin of the deceased also did not promptly inform the police that the deceased was wearing ornaments.

(iii) Learned Sub Divisional Magistrate did not comply with Rule 7.32 of the Rajasthan Police Rules. For the purpose of identification the arranging of ornaments was made by the police and an Advocate was also present.

18. Even otherwise the recovery of ornaments does not assume importance. Golden Chain and Ring are the articles of common use and can be found in any house. Their Lordships of the Supreme Court in State of Rajasthan Vs. Teg Bahadur and Others (2004)13 SCC 300, indicated in para 22 thus:-

> "The prosecution relied upon the recovery of earrings, hair clip, pieces of bangles belonging to the deceased from the well upon the disclosure statement made by the police. It may be stated that these articles of common used and can be found in any house. That apart, no family member of the deceased has identified these articles that the same belonged to the deceased

and/ or she was wearing the same at the time of occurrence."

19. In the ultimate analysis we are of the view that the conviction of appellants only on the basis of recovery of alleged incriminating articles was not proper. The prosecution has failed to establish the guilt against the appellants beyond reasonable doubt.

20. For these reasons, we allow the appeals and set aside the impugned judgment dated October 17, 2003 of the learned Additional Sessions Judge (Fast Track) No.2, Bharatpur. We acquit the appellant Surendra Singh of the charges under sections 302 and 392 IPC and 3/25 Arms Act. Appellants Khargo @ Khargendra Singh and Hoshiyar Singh also stand acquitted of the charges under sections 302/34 and 392 IPC. Appellants Surendra Singh, Khargo @ Khargendra Singh and Hoshiyar Singh, who are in jail, shall be set at liberty forthwith, if they are not required to be detained in any other case.

(Guman Singh),J. (Shiv Kumar Sharma)J.

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